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May 1, 2006

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: December 22, 2005

Case Number: TSO-0338

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter "the individual") to hold an access authorization.<sup>1</sup> The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual is eligible for access authorization. As discussed below, I find that access authorization should not be granted in this case.

I. BACKGROUND

This administrative review proceeding began with the issuance of a notification letter by a Department of Energy (DOE) Office, informing the individual that information in the possession of the DOE created substantial doubt pertaining to his eligibility for an access authorization in connection with his work. In accordance with 10 C.F.R. § 710.21, the notification letter included a statement of the derogatory information causing the security concern.

The Notification letter indicated the following security concerns regarding the individual. First, he failed to indicate in an August 23, 2003 questionnaire for National Security Positions

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1/ An access authorization (or security clearance) is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5.

(QNSP) that he had used marijuana on three occasions from October 1998 to November 1998, while holding a security clearance. This is a security concern under Section 710.8(f) (Criterion F) which in relevant part pertains to falsifications and omissions from Security Questionnaires.

Second, the letter states that the individual used marijuana once during 1970 and three times from October 1998 through November 1998. He also tested positive four times for marijuana while on probation for a January 26, 1998 arrest. According to the letter, this represents a security concern under Section 710.8(k) (Criterion K), which pertains to use of illegal substances.

Third, the letter refers to concerns under Section 710.10(1) (Criterion L), which pertains to reliability and trustworthiness. In this regard, the letter cites criminal actions by the individual. The letter describes a series of arrests during the period October 1998 through April 1999. The charges included: child abuse; fleeing and evading sheriff officers as they were attempting to serve him with a warrant for contempt of court; arrest for contempt of court; violation of a restraining order; resisting arrest; refusal to leave premises; and third degree assault and criminal mischief--domestic violence. Further concerns under Criterion L that are mentioned in the letter include: violation of probation for domestic violence by illegally using marijuana three times from October 1998 to November 1998 and testing positive four times for marijuana while on probation; indicating in a 1998 QNSP that he had not been arrested or charged with or convicted of any offense, but then admitting in a December 1998 Personnel Security Interview that he was arrested on January 26, 1998 for third degree assault and criminal mischief. Further, the individual failed to report to the DOE his October 1, 1998 arrest for violation of a restraining order, resisting arrest and refusal to leave premises, and his October 20, 1998 arrest for contempt of court/harassment. The individual did not fully admit the October 20 arrest in a December 29, 1998 PSI. He also failed to list four arrests in the August 23, 2003 QNSP. The arrests were on April 7, 1999 for child abuse; April 6, 1999 for fleeing and evading sheriff officers as they were attempting to serve him with a warrant for contempt of court; October 20, 1998 for contempt of court/harassment; and October 1, 1998 for violation of restraining order resisting arrest and refusal to leave premises. According to the notification letter, these failures of disclosure constitute Criterion L security concerns because they indicate a lack of trustworthiness.

The notification letter informed the individual that he was entitled to a hearing before a Hearing Officer in order to respond to the information contained in that letter. The individual requested a hearing, and that request was forwarded by the DOE Office to the Office of Hearings and Appeals (OHA). I was appointed the Hearing Officer in this matter. In accordance with 10 C.F.R. § 710.25(e) and (g), the hearing was convened.

At the hearing, the individual represented himself, and testified on his own behalf. He brought forward no witnesses to support his position. The DOE Counsel presented the testimony of a Security Specialist.

## II. Applicable Standards

A DOE administrative review proceeding under 10 C.F.R. Part 710 is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of case, we apply a different standard, which is designed to protect national security interests. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d).

This standard implies that there is a strong presumption against the granting or restoring of a security clearance. See Dep't of Navy v. Egan, 484 U.S. 518, 531 (1988) ("the clearly consistent with the interests of the national security test" for the granting of security clearances indicates "that security-clearance determinations should err, if they must, on the side of denials"); Dorfmont v. Brown, 913 F.2d 1399, 1403 (9th Cir. 1990)(strong presumption against the issuance of a security clearance). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. Personnel Security Hearing (Case No. VSO-0002), 24 DOE ¶ 82,752 at 85,511 (1995).

Once a security concern has been found to exist, the individual has the burden of going forward with evidence to rebut, refute, explain, extenuate or mitigate the allegations. Personnel Security Hearing (VSO-0005), 24 DOE ¶ 82,753 (1995), aff'd, 25 DOE ¶ 83,013 (1995). See also 10 C.F.R. § 710.7(c).

### III. The Hearing

At the beginning of the hearing, the individual stated that he had planned to present testimony from his current wife, but that she would be unable to attend due to a family emergency. I agreed to hold a second phase of the hearing by telephone to take her testimony. Further, the individual's friend who was supposed to testify by telephone during Phase I was unavailable. I agreed to take this witness' testimony during that second phase of the hearing. Tr. at 92.

#### Hearing: Phase I

With respect to his criminal actions, the individual simply reiterated his overall position that he was under stress at the time of his divorce, and that this caused him to act in an unusual way. However, he contended that this period in his life, which took place seven or eight years ago, is now well behind him and should not present any further concerns. Tr. at 90.

He had several explanations with respect to his failure to fill out the QNSP fully and accurately regarding his arrest record. First, he stated that he thought that it was fully completed because by listing one of the charges against him, the DOE could locate all associated charges, since they were under the same "cause number." Tr. at 20. DOE Exh. 22, Question 23. He then admitted he was wrong, and that he should have given a more complete answer. He stated that he was embarrassed and scared to do so. Tr. at 26, 30. Finally, he claimed he had made a correction to the inaccurate QNSP several months after the first false QNSP. However, during the hearing we examined the second QNSP, which was part of the DOE record, and we could not find any correction made to the question regarding arrests. DOE Exh. 21. Tr. at 37-39.

At this point, the DOE counsel contacted a DOE security specialist by telephone. He asked her to examine the individual's personnel security file to ascertain whether there was any other version of this later QNSP that set forth a correction to the question regarding the arrest record. She testified that there was no amended or corrected QNSP in his file that showed a correction with respect to this matter. Tr. at 49, 54-64. The only change she could identify related to some information regarding the name of individual's current wife. Tr. at 64.

Since as stated above, the individual did not bring forward supporting witnesses, the hearing was closed in anticipation of

receiving additional testimony by telephone in the follow-up hearing.

#### Hearing: Phase II

The individual and his witnesses did not appear for this phase of the hearing, which was scheduled for April 3, 2006. Accordingly, I closed the hearing. Tr. II at 2. The day after the hearing was supposed to take place, the individual sent me an e-mail message asking me to telephone him, which I did. He told me that he had had a "really bad day" on the day Phase II of the hearing was supposed to take place, because of "court issues with his ex-wife." This "bad day" had mistakenly caused him to believe that Phase II of the hearing was to take place on April 4, rather than the agreed-upon date of April 3. He also asserted that he had arranged for his witnesses to appear.

#### IV. Analysis

The concerns involved in this case are very serious. They involve falsification, untrustworthiness, use of illegal drugs, and criminal activity. The individual's contention here is that his criminal actions were limited to a discrete period in his life when he was going through a difficult divorce. This caused him to act irrationally and uncharacteristically. Since, according to the individual, this period took place about five or six years ago it should be viewed as well behind him now, and no longer a factor in assessing his overall reliability. He makes a similar argument with respect to his use of marijuana. He believes his falsifications and omissions were merely "misunderstandings" that were corrected.

I find that none of the security concerns regarding this individual have been resolved. First, it is clear that his unreliable behavior continues. He did not produce witnesses at the hearing as he said he would. I was not convinced by his excuses in this regard. He stated that his wife could not appear during Phase I of the hearing because of family matters, and she could not take a phone call because she was seeking to replace their automobile tires.<sup>2</sup> His friend did not answer the phone when he was called.<sup>3</sup>

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2/ This conversation took place in a discussion just prior to opening the hearing and was not on the record.

3/ At that point in the hearing, the individual left a message for the friend to return our call, but he did not do so within  
(continued...)

The individual did not appear for Phase II of the hearing. The individual indicated that "due to court issues with his ex-wife" on the day of the hearing he became confused and had mistaken the day on which the hearing was supposed to take place. This excuse makes no sense whatsoever. It seems to me that if he had arranged earlier for his two witnesses to appear, those witnesses would have spoken to him on the day of the hearing and corrected his confusion about the hearing date. This unbelievable excuse further confirms my overall impression of this individual that he will say whatever is expedient to try to explain his behavior. It also belies his assertion that his days of untrustworthy behavior due to stress with his prior wife are behind him. Tr. at 16. In fact, his untrustworthiness continues, as evidenced by his failure to appear for part two of the hearing.

His "explanations" for the false QNSPs are similarly not credible. An applicant for a security clearance has no reason to expect that the DOE will "uncover" all arrests, simply because they may have been assigned the same docket number. He has no reason to assume that it is appropriate to make less than a full disclosure of his criminal acts. Thus, his excuse that he only needed to provide information about one of his many arrests under a single "cause number" is inadequate and disingenuous. The individual's excuse that he thought he made an amendment correcting the omission is also unbelievable, given that there was no amendment of this nature on the October QNSP. My impression is that the individual conveniently adopted this excuse as a last resort at the hearing.

I also find that the individual has not resolved the security concerns with respect to his use of marijuana. At the hearing the individual admitted that he should have disclosed his marijuana use on the QNSP. Tr. at 32. However, at this late date, such an admission does not resolve the falsification concern. He has also not convinced me that he no longer uses marijuana. He has brought in no witnesses to confirm this.

#### V. CONCLUSION

Ultimately, I do not find credibility in any of the assertions made by this individual during the course of this administrative review

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3/ (...continued)

a one-half hour period, at which point I closed the hearing.

process. The individual has therefore not resolved the Criteria F, K, and L concerns in this case. It is therefore my decision that he should not be granted access authorization.

The parties may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Virginia A. Lipton  
Hearing Officer  
Office of Hearings and Appeals

Date: May 1, 2006